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NOTES

SEXUAL HARASSMENT ONE STEP FORWARD, ONE STEP BACKWARD

*Meritor Savings Bank, F.S.B. v. Vinson*¹

The sexual harassment of women in the workplace is a major, yet largely overlooked, problem in the United States.² In fact, it has been suggested that the “[i]ntimate violation of women by men is sufficiently pervasive in American society as to be nearly invisible.”³ Fortunately, studies and litigation within the past decade have exposed sexual harassment in the workplace and have brought the problem under public scrutiny.

Title VII of the Civil Rights Act of 1964 provides that it is unlawful for an employer to discriminate against employees on the basis of sex.⁴ Discrimination based upon sex has now been interpreted so as to encompass certain forms of sexual harassment.⁵ There has been considerable litigation in the past decade focusing on what constitutes actionable sexual harassment under Title VII and the scope of employer’s liability thereunder. However, the cases

1. 106 S. Ct. 2399 (1986).

2. Studies reveal that between twenty-five and ninety percent of all working women in America have experienced some form of sexual harassment while working. See, e.g., B. GUTK, *SEX AND THE WORKPLACE* 42-60 (1985); C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 25-32 (1979). These studies are based on the perceptions of women regarding their experiences at work and may not, in some instances, reflect what is regarded as actionable sexual harassment.

3. C. MACKINNON, *supra* note 2, at 1.

4. 42 U.S.C. § 2000e-2(a) provides in pertinent part:

It shall be an unlawful employment practice for an employer-(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex . . . ; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s . . . sex.

42 U.S.C. § 2000e-2(a) (1972).

5. See 29 C.F.R. § 1604.11 (1985). These guidelines were promulgated by the Equal Employment Opportunity Commission [hereinafter EEOC].

have been far from uniform on these issues, and it has been suggested that "we cannot assume the legal gains are durable until the Supreme Court has ruled favorably on the issue—and perhaps not even then."⁶ Recently, the United States Supreme Court addressed these issues in *Meritor Savings Bank, F.S.B. v. Vinson*.

In 1974, Mechelle Vinson was hired as a teller-trainee for Meritor Savings Bank (the bank) by Sidney Taylor, a vice-president of the bank.⁷ Thereafter, Vinson was promoted in succession to teller, head teller and assistant branch manager. Those advancements were based upon merit alone.⁸ However, in 1978, the bank discharged Vinson because of her excessive use of sick leave.⁹

After her discharge, Vinson instituted an action against the bank and her supervisor, Taylor, claiming that she had been subjected to sexual harassment during her employment at the bank. Vinson based her claim upon an allegation that her supervisor had made repeated sexual demands of her. She testified that she submitted to those demands because she feared refusal would result in her dismissal.¹⁰ She also testified that her supervisor fondled her in front of other employees, followed her into the women's restroom, exposed himself to her, and forcibly raped her on several occasions.¹¹ Vinson contended that these acts subjected her to sexual harassment in that they created a sexually "hostile environment" within the workplace.

The supervisor denied all allegations and contended that Vinson had made her claims in response to a business-related dispute.¹² The bank defended the action on three grounds. First, the bank contended that the allegation of a sexually hostile work environment was insufficient to state a claim under Title VII. It argued that in order for a claim of sexual harassment to be actionable the claimant must have suffered a tangible, economic loss as a result of such harassment.¹³ Second, the bank contended that Vinson

6. C. MACKINNON, *supra* note 2, at xii.

7. *Meritor*, 106 S. Ct. at 2402.

8. *Id.*

9. *Id.* Vinson never claimed that her dismissal was related to her alleged sexual harassment.

10. *Id.*

11. *Id.*

12. *Id.* at 2403. "Taylor denied respondent's allegations of sexual activity, testifying that he never fondled her, never made suggestive remarks to her, never engaged in sexual intercourse with her and never asked her to do so." *Id.*

13. *Id.* at 2404. A tangible economic loss in this context may include, but is not limited to, demotion, dismissal, or denial of job benefits. *See, e.g.,* Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977) (continued employment conditioned upon submitting to sexual demands); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) (abolishing the victim's job in retaliation for refusing to grant sexual favors); Stringer v. Pennsylvania Dep't of Community Affairs, Bureau of Human Resources, 446 F. Supp. 704 (M.D. Pa. 1978) (refusal of sexual advances resulting in victim's discharge).

was precluded from recovery because she participated in the relationship with her supervisor voluntarily.¹⁴ Third, the bank claimed that it could not be held liable for these acts because it was without knowledge or notice of the alleged conduct.¹⁵ In support of this claim, the bank presented evidence that a grievance procedure had been implemented and was in effect at the time of the alleged conduct, yet Vinson had failed to employ it.¹⁶

The district court denied relief, concluding that a violation of Title VII had not been presented. The district court ruled that if in fact a relationship had existed between Vinson and her supervisor, that relationship was voluntary and not related to their employment.¹⁷ The district court also concluded that the bank could not be held liable because it was without notice of the alleged actions.¹⁸

The Court of Appeals for the District of Columbia reversed the judgment and remanded the case. The appellate court felt the district court had failed to consider whether a violation based upon "hostile environment" sexual harassment had occurred.¹⁹ The appellate court stated that if Vinson's toleration of the harassment became a condition of her employment, the fact that she participated in the acts voluntarily "had no materiality whatsoever."²⁰ Finally, the court of appeals held that the bank was absolutely liable for sexual harassment committed by supervisory personnel, whether or not they had knowledge of the alleged acts.²¹

The United States Supreme Court granted certiorari and addressed three major issues in its opinion. First, the Court held that a claim of "hostile environment" sexual harassment is an actionable form of discrimination under Title VII.²² Second, the Court stated that while the fact that a complainant participated voluntarily in the alleged acts was a relevant factor to be considered in determining whether harassment had in fact occurred, it was not an absolute defense to such an action.²³ Finally, the Court concluded

14. *Meritor*, 106 S. Ct. at 2406. As previously noted, Vinson testified that she participated in the alleged acts because she feared refusal would result in her dismissal. *Id.* at 2402.

15. *Id.* at 2407-08.

16. *Id.* at 2408-09. However, the bank's grievance procedure was particularly ineffective in this situation in that employees were to report their grievances to their immediate supervisor. *See infra* text accompanying note 100.

17. *Meritor*, 106 S. Ct. at 2403.

18. *Id.* The district court noted that neither Vinson nor any other employee had ever lodged a complaint about sexual harassment. *Id.*

19. *Vinson v. Taylor*, 753 F.2d 141, 145 (D.C. Cir.), *reh'g denied*, 760 F.2d 1330 (1985).

20. *Id.* at 146.

21. *Id.* at 150. In holding the bank absolutely liable, the court of appeals relied upon the language of Title VII "and interpretations authoritatively placed upon it." *Id.* The court of appeals specifically stated that it did not rely upon the common law doctrine of respondeat superior to hold the bank liable. *Id.*

22. *Meritor*, 106 S. Ct. at 2405-06.

23. *Id.* at 2406-07.

that it was improper to "entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case."²⁴ In doing so, the Court determined that it was relevant that there existed a grievance procedure which the claimant failed to invoke, but that that fact was not dispositive as to the issue of employer liability.²⁵

A "hostile environment" exists when an employee is situated within a work place that is sexually offensive.²⁶ Such harassment can occur in a variety of forms.²⁷ However, in order to be actionable the harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"²⁸ Such a determination will apparently be made on a case by case basis by analyzing the facts and circumstances surrounding each claim of "hostile environment" sexual harassment.²⁹

It is important to distinguish "hostile environment" harassment from quid pro quo harassment.³⁰ The latter can occur in two situations. First, it can occur when tangible employment benefits are withheld from the victim *until* she succumbs to the sexual demands of the employer or supervisor.³¹ Second, quid pro quo harassment occurs when an employer or supervisor *retaliates* against a victim who has refused to submit to sexual advances by withholding tangible employment benefits.³² Because quid pro quo harassment effects a victim's "compensation, terms, conditions or privileges of

24. *Id.* at 2409.

25. *Id.* at 2408-09.

26. See 29 C.F.R. § 1604.11(a)(3) (1985); see also *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983) (sexual slurs, insults, and innuendos addressed to and employed about air traffic controller amounted to a sexually offensive work environment); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982) (numerous harangues of demeaning sexual inquiries and vulgarities and repeated requests for sexual favors addressed to police department dispatcher amounted to a sexually hostile environment); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981) (requests for sexual favors and inquiries into the sexual proclivities of an employee amounted to a sexually hostile environment).

27. See, e.g., *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424 (8th Cir. 1984); *Phillips v. Smalley Maintenance Servs., Inc.*, 711 F.2d 1524 (11th Cir. 1983) (verbal and physical conduct of a sexual nature); *Zabkowitz v. West Bend Co.*, 589 F. Supp. 780 (E.D. Wis. 1984) (offensive and abusive language); *Coley v. Consolidated Rail Corp.*, 561 F. Supp. 645 (E.D. Mich. 1982) (requests for sexual favors).

28. *Meritor*, 106 S. Ct. at 2406 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

29. The Supreme Court felt that the allegations in *Meritor*, including "not only pervasive harassment but also criminal conduct of the most serious nature . . . [were] plainly sufficient to state a claim for 'hostile environment' sexual harassment." *Id.* at 2406.

30. See *C. MacKinnon*, *supra* note 2, at 32-47.

31. *Id.* at 32-33.

32. *Id.*

employment,"³³ it has been recognized as an actionable form of sexual harassment under Title VII.³⁴

The Supreme Court's recognition of the "hostile environment" theory of sexual harassment is based upon sound authority. First, as the Court points out, the language of Title VII is not limited to economic or tangible discrimination.³⁵ Title VII provides that an employer may not discriminate against an employee "with respect to his compensation, terms, conditions, or privileges of employment."³⁶ Such language evidences a congressional intent not to limit the scope of Title VII to economic or tangible discrimination.³⁷ Second, the "hostile environment" theory is consistent with Equal Employment Opportunity Commission (EEOC) guidelines.³⁸ "[T]he EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule and insult."³⁹ Therefore, courts have generally given EEOC guidelines considerable weight when deciding cases involving employment issues.⁴⁰ Third, several federal appellate courts that have considered this issue since the promulgation of the EEOC guidelines have recognized "hostile environment" as a theory of recovery.⁴¹ Finally, "hostile environment" discrimination has been recognized in several other areas of Title VII litigation.⁴²

33. See *supra* note 4 and accompanying text.

34. See, e.g., *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

35. See *supra* note 4 and accompanying text.

36. 42 U.S.C. § 2000e-(2)(a) (1972).

37. *Meritor*, 106 S. Ct. at 2404-05.

38. 29 C.F.R. § 1604.11(a) (1985), provides that sexual harassment includes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when . . . (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

39. *Meritor*, 106 S. Ct. at 2405.

40. "[W]hile not controlling . . . [the guidelines] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.* at 2405 (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

41. See, e.g., *Horn v. Duke Homes, Div. of Windsor Mobile Homes*, 755 F.2d 599 (7th Cir. 1985); *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77 (3d Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).

42. *Meritor*, 106 S. Ct. at 2405; see, e.g., *Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87, 88 (8th Cir. 1977) (harassment based upon national origin); *Firefighters Inst. for Racial Equality v. St. Louis*, 549 F.2d 506, 514-15 (8th Cir. 1977), *cert. denied sub nom. Banta v. United States*, 434 U.S. 819 (1977); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir. 1976) (harassment based upon race); *Compston v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976) (harassment based upon religion).

The Supreme Court's recognition of the "hostile environment" theory is also based upon sound reasoning. Actionable harassment should not be predicted upon whether or not the victim has suffered some tangible economic detriment.⁴³ The psychological effects associated with sexual harassment, although non-economic, are as great, if not greater, than the tangible effects. "Like women who are raped, sexually harassed women feel humiliated, degraded, ashamed, embarrassed, and cheap. . . ."⁴⁴ Refusing to recognize this theory would allow an employer⁴⁵ to harass an employee just short of the point of denying her a tangible job benefit, and thereby leave the employee without redress under Title VII.⁴⁶ The victim of such harassment would be placed in a no-win situation:

Should a woman have to leave a job she needs financially, qualifies for, or finds fulfilling because the employer can make his sexual needs part of it? Or should she have no recourse other than the hope he will stop, or never try again, or that she can stand it just for the chance to work there, or to work at all? Will it ever be different any place else? When workplace access, advancement, and tolerability (not to mention congeniality) depend upon such an employer's good will, women walk very thin lines between preserving their own sanity and self-respect and often severe material hardship and dislocation.⁴⁷

This quandry which confronts victims of "hostile environment" sexual harassment makes it evident that a rule requiring victims to show a tangible economic detriment would undermine what should be the primary purpose of Title VII—the prevention of sexual harassment.

The bank contended in *Meritor* that they could not be held liable for the alleged acts because Vinson participated in them voluntarily.⁴⁸ The Supreme Court rejected this argument, holding that the "correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation . . . was voluntary."⁴⁹ Therefore, voluntary participation by the complainant does not constitute an

43. See *Rogers v. Equal Employment Opportunity Comm'n*, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972) (psychological well-being is included within the "terms, conditions, or privileges of employment").

44. C. MACKINNON, *supra* note 2, at 47.

45. 42 U.S.C. § 2000e(b) (1972), defines "employer" to include the agents of the employer.

46. See *Bundy v. Jackson*, 641 F.2d 934, 945 (D.C. Cir. 1981). The *Bundy* court reasoned that requiring a tangible action would allow an employer to manipulate harassment by "stopping short of firing the employee or taking any other tangible actions in response to her resistance." *Id.*

47. C. MACKINNON, *supra* note 2, at 41-42; see also *Bundy v. Jackson*, 641 F.2d 934, 946 (D.C. Cir. 1981).

48. The district court accepted this argument. See *supra* note 17 and accompanying text.

49. *Meritor*, 106 S. Ct. at 2406.

absolute defense to a sexual harassment action, but instead, is a factor in deciding whether the sexual advances were welcome.

The fact that the complainant's participation was voluntary was wisely held not to be case dispositive. Voluntary participation, while relevant,⁵⁰ does not necessarily indicate, in and of itself, that the conditions of the work place were welcome. There are a variety of reasons which may lead the victim into failing to resist advances made by her superiors.⁵¹ Included among these reasons are the fear of demotion or dismissal.⁵²

Although the fact that the complainant participated in the alleged acts voluntarily is not considered an absolute defense, it does not follow that voluntariness is irrelevant as to whether or not the complainant was actually subjected to actionable harassment. In fact, EEOC guidelines indicate that courts should look to all of the circumstances surrounding the alleged harassment to determine whether a Title VII violation has occurred.⁵³ This may include considering, for example, evidence pertaining to the complainant's dress and personal fantasies.⁵⁴ The Supreme Court in *Meritor* held that such evidence, although not dispositive, was relevant in determining whether the alleged sexual advances were unwelcome.⁵⁵

The Supreme Court's determination that evidence of a complainant's dress and personal fantasies are relevant possibly reflects "the overwhelming picture one gains from examining people's attitudes about sexuality at work."⁵⁶ "[M]ost people see it [a sexual advance] as a flattering, complimentary act in the abstract, and people encourage such advances by dressing to be attractive or even seductive."⁵⁷ Therefore, "[i]f advances occur, the recipient probably welcomed them and certainly could have prevented them, had they wanted to."⁵⁸ Such attitudes support the idea that all social-sexual encounters are welcome.⁵⁹ However, such attitudes are not consistent with reality.⁶⁰ Studies reveal that a majority of women are not complimented by sexual advances,

50. Apparently, the relevance of voluntary participation lies in the fact that not all expressions of sexuality constitute sexual harassment just because they occur in a work setting. See B. GUTK, *supra* note 2, at 7.

51. *Id.* at 70-73. Chapter Five of Gutek's book explores the responses of women who have been subjected to sexual advances at work.

52. *Id.*

53. 29 C.F.R. § 1604.11(b) (1985) provides: "In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred."

54. *Meritor*, 106 S. Ct. at 2406-07.

55. *Id.*

56. B. GUTK, *supra* note 2, at 99.

57. *Id.*

58. *Id.*

59. *Id.* at 101.

60. *Id.* at 101-02.

but are insulted.⁶¹ Ironically, however, the same women who feel insulted by such advances tend to think other women would be flattered and complimented by the same or similar advances.⁶² These facts tend to indicate that a jury might overemphasize the significance of evidence relating to a victim's provocative dress and speech. Therefore, courts should weigh the probative value of admitting such evidence against its potential for unfair prejudice.

Probably the most controversial issue in sexual harassment litigation is defining the proper scope of employer liability. Because *Meritor* addressed the question of employer liability for the acts committed by supervisory personnel, the following discussion is limited to that aspect.

The scope of employer liability for the sexually harassing acts of supervisors may in part depend upon what theory the victim has alleged. Generally, employers are held vicariously liable for quid pro quo harassment committed by their supervisory personnel.⁶³ The courts, however, have not been uniform in determining the standard of liability to impute to employers in the "hostile environment" situation. Liability in those cases has ranged from strict employer liability to no liability unless the employer had actual or constructive knowledge of the harassment.⁶⁴

The conflicting standards of employer liability adopted by the lower courts in *Meritor* is indicative of the inconsistency of the courts in addressing the scope of employer liability in "hostile environment" actions. The district court held that the employer-bank could not be held liable unless it had notice of the supervisor's alleged conduct.⁶⁵ The appellate court reversed, holding that the employer was strictly liable when the acts of its supervisor created a "hostile environment."⁶⁶

As opposed to the lower courts in *Meritor*, the Supreme Court declined to issue a "definitive rule" on the issue of employer liability.⁶⁷ The Court

61. *Id.* at 99-101.

62. *Id.*

63. See Comment, *Abolishing the Quid Pro Quo and Work Environment Distinctions in Sexual Harassment Cases Under the Civil Rights Act of 1964: Vinson v. Taylor*, 60 ST. JOHN'S L. REV. 177, 178-79 (1985).

64. Compare *Horn v. Duke Homes, Div. of Windsor Mobile Homes*, 755 F.2d 599 (7th Cir. 1985) and *Jeppsen v. Wunnicke*, 611 F. Supp. 78 (D. Alaska 1985) (holding the employer to a strict liability standard) with *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982) and *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977) (employer only liable if had knowledge of the harassment and failed to take prompt remedial action).

65. *Meritor*, 106 S. Ct. at 2403.

66. *Vinson v. Taylor*, 753 F.2d 141, 150 (D.C. Cir.), *reh'g denied*, 760 F.2d 1330 (1985).

67. *Meritor*, 106 S. Ct. at 2408. The Court noted that the record was insufficient to decide the issue of employer liability. "We do not know at this stage whether Taylor made any sexual advances toward respondent at all, let alone whether those advances were unwelcome, whether they were sufficiently persuasive to constitute a

did, however, seem to distance itself from strict employer liability. Writing for the Court, Justice Rehnquist concluded that it was "wrong to entirely disregard agency principles⁶⁸ and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of the particular case."⁶⁹ The Court's determination that traditional agency principles should be employed to determine the scope of employer liability was influenced by Congress' definition of "employer" for Title VII purposes to include any "agent" of the employer.⁷⁰ This definition, the Court felt, indicated a congressional attempt to limit the scope of employer liability.⁷¹

When a complainant brings an action under the quid pro quo theory of harassment employers are generally held strictly liable for the acts of harassment committed by supervisory personnel.⁷² The basis underlying this principle is the agency doctrine of respondeat superior.⁷³ Generally, an employer is liable for the torts committed by his employees while acting within the scope of their employment. An employee acts within the scope of his employment when he performs functions which have been delegated to him by the employer. "[S]exual harassment that affects tangible job benefits is an exercise of authority delegated to the supervisor by the employer, and thus gives rise to employer liability."⁷⁴ It would seem to follow that if a supervisor

condition of employment, or whether they were 'so persuasive and so long continuing . . . that the employer must have become conscious of [them].'" *Id.* (quoting *Taylor v. Jones*, 653 F.2d 1193, 1197-99 (8th Cir. 1981) (court held an employer liable for a racially hostile working environment based on constructive knowledge)); *see also Cummings v. Walsh Constr. Co.*, 561 F. Supp. 872 (S.D. Ga. 1983) (sexual harassment by supervisors was so widespread and common at the job site that it created an inference of constructive knowledge on the part of the defendant company).

68. *See* RESTATEMENT (SECOND) OF AGENCY §§ 219-237 (1958).

69. *Meritor*, 106 S. Ct. at 2409. However, the Court stated that the "common law principles may not be transferable in all their particulars to Title VII." *Id.* at 2408. The concurring opinion, while joining in the judgment, criticized the majority for not following EEOC guidelines which purport to hold employers strictly liable in "hostile environment," as well as quid pro quo cases. *Id.* at 2409-10 (Marshall, J., concurring). Another concurring opinion found no inconsistency between Rehnquist and Marshall's opinions and, therefore, concurred in both opinions. *Id.* at 2411 (Stevens, J., concurring). Therefore, the question of employer liability will not be completely resolved until it is decided to what extent traditional agency principles will be applied to "hostile environment" cases.

70. *Id.* at 2408. The definition of "employer" for Title VII purposes can be found at 42 U.S.C. § 2000e(b) (1972).

71. *Meritor*, 106 S. Ct. at 2408.

72. *See supra* note 63 and accompanying text.

73. *See* RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

74. *Meritor*, 106 S. Ct. at 2410 (Marshall, J., concurring); *see also Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982) ("[T]he supervisor relies upon his actual or apparent authority to extort sexual consideration from an employee. Therein lies the quid pro quo. In that case the supervisor uses the means furnished to him by the employer to accomplish the prohibited purpose."). *But see Barnes v.*

acted outside the scope of his employment when sexually harassing another employee the employer would not be held liable. However, one court has found employer liability even where the supervisor acted in direct contravention of a promulgated company policy.⁷⁵ Such a holding is consistent with EEOC guidelines.⁷⁶

The courts' treatment of employer liability in *quid pro quo* cases appears to be as sound in policy as it is in agency law. First, the employer is in a better position than the victim to absorb losses resulting from the torts of its employees.⁷⁷ Second, prevention is also enhanced through the application of vicarious liability.⁷⁸ An employer who can be held liable for the torts of his employees will have a greater incentive to take a firm stand against harassment and will also be more careful in the selection and supervision of his employees.⁷⁹ This is important because "[w]hen top management tolerates or condones sexual harassment of employees, that standard reverberates throughout the organization."⁸⁰

The Court in *Meritor* was presented with the issue of employer liability in a "hostile environment" sexual harassment case. As previously noted, the Court refused to issue a "definitive rule" concerning employer liability.⁸¹ The Court did recognize that Congress has attempted to implement agency principles in determining employer liability under Title VII.⁸² Such an implementation, however, may leave sexually harassed victims with an irremediable cause of action in "hostile environment" cases. The EEOC, in its brief as *amicus curiae*, suggested that the agency relationship "will often

Costle, 561 F.2d 983, 995 (D.C. Cir. 1977) (MacKinnon, J., concurring) ("The sexual harassment furthered no objective of the government agency, nor was it part of the supervisor's actual or ostensible authority, nor was it even within the outermost boundaries of what could be perceived to be his apparent authority.").

75. *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1982). *But see Barnes v. Costle*, 561 F.2d 983, 993 (D.C. Cir. 1977) ("We realize that should a supervisor contravene employer policy without the employer's knowledge and the consequences are rectified when discovered the employer may be relieved of responsibility under Title VII.").

76. 29 C.F.R. § 1604.11(c) (1985), provides an employer "is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer."

77. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON TORTS* § 69 (1984); *see also Horn v. Duke Homes, Div. of Windsor Mobile Homes*, 755 F.2d 599, 605 (7th Cir. 1985) ("It was Congress' judgment that employers, not the victims of discrimination, should bear the cost of remedying and eradicating employment discrimination.").

78. W. KEETON, D. DOBBS, R. KEETON & R. OWEN, *supra* note 77, § 69.

79. *Id.*

80. B. GUTK, *supra* note 2, at 7.

81. *See supra* note 67 and accompanying text.

82. *See supra* notes 68-72 and accompanying text.

disappear” in such cases.⁸³ An agency relationship exists where an employee (the supervisor in this case) is acting within the scope of his employment.⁸⁴ The supervisor has actual or apparent authority to “hire, fire, discipline or promote.”⁸⁵ Because a supervisor does not act within those spheres of authority when he creates a sexually “hostile environment,” he acts outside the scope of his employment.⁸⁶ Therefore, the agency relationship disappears and the employer is no longer liable for the acts of the supervisor.

Another line of reasoning suggests that a supervisor may be acting within his apparent scope of authority when he creates a sexually “hostile environment.”⁸⁷ The basis of such a finding is that a supervisor’s authority goes beyond that of hiring, firing, disciplining and promoting, extending to the responsibility for “the day-to-day supervision of the work environment and . . . ensuring a safe, productive workplace.”⁸⁸ “There is no reason why abuse of the latter authority should have different consequences than abuse of the former.”⁸⁹ Under this reasoning, a supervisor who creates a sexually “hostile environment” in violation of Title VII is acting within the scope of his employment. Because he is acting within the scope of his employment he is considered an agent of the employer, and thus the employer is liable for the supervisor’s acts.

The Supreme Court’s apparent approval of the use of agency principles in deciding what liability should be imputed to employers might prove to be unworkable given the above conflicting interpretations of agency law. It is possible that similar situations could receive dissimilar treatment in differing jurisdictions based upon individual perceptions of agency law.

A more viable standard of liability would appear to be that espoused by the EEOC in its guidelines.⁹⁰ This standard has been interpreted to impose strict liability on employers for the sexually harassing acts of their supervisory

83. *Meritor*, 106 S. Ct. at 2408.

84. See RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

85. *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979); see also *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982).

86. See *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 80 (3d Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982); *Barnes v. Costle*, 561 F.2d 983, 995 (D.C. Cir. 1977) (MacKinnon, J., concurring).

87. *Meritor*, 106 S. Ct. at 2410-11 (Marshall, J., concurring). Justice Marshall suggests that “it is the authority vested in the supervisor by the employer that enables him to commit the wrong.” *Id.* at 2411.

88. *Id.* at 2410; see also *Henson v. City of Dundee*, 682 F.2d 897, 913 (11th Cir. 1982) (“An employer delegates certain responsibilities to its supervisors, one of which certainly is to create a pleasant working environment.”).

89. *Meritor*, 106 S. Ct. at 2410.

90. 29 C.F.R. § 1604.11(c) (1985) provides: “Applying general Title VII principles, an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment . . . whether the employer knew or should have known of their occurrence.”

employees.⁹¹ Therefore, "hostile environment" harassment would receive the same treatment as quid pro quo harassment in regards to employer liability. Abolishing the distinction between the two theories appears to be sound in that the same policy justifications that underlie strict liability for quid pro quo harassment⁹² are as equally applicable to "hostile environment" harassment. "[S]exual harassment in the workplace environment . . . may never be mitigated without expunging the knowledge requirement and imposing an affirmative duty on the part of the employer to take preventive measures."⁹³ Moreover, "the imposition of legal responsibility would actually serve to motivate employers to exert greater control over the work environment to prevent sexual harassment by supervisors."⁹⁴

Other areas of Title VII litigation, including areas in which a claim of a "hostile environment" has been found to be actionable, support the application of strict liability in sexual harassment cases.⁹⁵ The Supreme Court in *Meritor*, in apparently rejecting strict liability in this area, espoused no reasons why sex discrimination should be treated differently than other Title VII areas. However, in defense of the Court it should be noted that the EEOC itself, in its brief as amicus curiae, argued for a standard somewhat different than the strict liability standard found in its guidelines.⁹⁶ The EEOC argued that an employer should not be held liable for the acts of supervisors when that employer has promulgated a policy against sex discrimination, and implemented a procedure to resolve sexual harassment claims that the victim failed to invoke.⁹⁷ In that situation, the EEOC would only hold an employer liable if they had actual knowledge of the harassment.⁹⁸

The Supreme Court in *Meritor* rejected the argument that a policy against discrimination and a general grievance procedure, coupled with the complainant's failure to invoke that procedure, would absolutely insulate the employer from liability.⁹⁹ In *Meritor*, a grievance procedure was in existence, but that procedure was particularly ineffective in that the employee wishing to invoke the procedure was to report her grievances directly to her supervisor.¹⁰⁰ Therefore, the victim would have been required to report the situation directly to the person who was responsible for creating it. The Court

91. *Horn v. Duke Homes, Div. of Windsor Mobile Homes*, 755 F.2d 599, 606 (7th Cir. 1985).

92. See *supra* text accompanying notes 79-82.

93. Comment, *supra* note 63, at 189.

94. *Id.* at 187.

95. See Development, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII*, 61 B.U.L. REV. 535, 540 (1981).

96. *Meritor*, 106 S. Ct. at 2408.

97. *Id.*

98. *Id.*

99. *Id.* at 2408-09.

100. *Id.* at 2409.

did state that an employer's contention that the complainant's failure to invoke its grievance procedure should insulate it from liability "might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward."¹⁰¹ The Court thus felt that the existence of a grievance procedure, coupled with the complainant's failure to invoke that procedure, was "plainly relevant"¹⁰² to the issue of employer liability.

The Court's holding as it pertains to grievance procedures is supported by prior case law.¹⁰³ At least one federal appellate court has declined to read an exhaustion of company remedies requirement into Title VII.¹⁰⁴ The *Meritor* holding also finds support in a recently published study which indicates that a majority of sexually harassed women will not report harassment for a variety of reasons.¹⁰⁵ Among those reasons for not reporting harassment are (1) a fear of being blamed for the incident, (2) a fear that the harasser will be hurt by such a reporting, (3) a belief that reporting would be a waste of time, and (4) a feeling that there was no need to report the incident.¹⁰⁶ Therefore, the existence of a *general* grievance procedure, although an appropriate attempt at resolving disputes within the work place, should not relieve the employer from liability because of the mere failure to employ the procedure.

After the Supreme Court's opinion in *Meritor*, the following issue remains: What, if anything, can an employer do to protect himself from liability in a Title VII action when he has no knowledge of the sexually harassing acts of supervisory personnel? The Court hinted that an employer might be able to better insulate himself from liability by doing two things. First, the employer should implement a nondiscrimination policy which specifically addresses sexual harassment, thereby alerting employees to the employer's interest in preventing such harassment.¹⁰⁷ Second, the employer should invoke a grievance procedure within the company "calculated to encourage victims of harassment to come forward"¹⁰⁸ and promptly report the harassment.¹⁰⁹ In order to achieve the latter goal the grievance procedure should be set up so as to provide meaningful avenues to complain by allowing the complainant to direct her complaint to someone other than her immediate supervisor.¹¹⁰

101. *Id.*

102. *Id.*

103. *Miller v. Bank of America*, 600 F.2d 211, 214 (9th Cir. 1979).

104. *Id.*

105. B. GUTEK, *supra* note 2, at 71-72.

106. *Id.*; see also C. MACKINNON, *supra* note 2, at 48-49.

107. *Meritor*, 106 S. Ct. at 2409.

108. *Id.*

109. See *Barnes v. Costle*, 561 F.2d 983, 1000 (D.C. Cir. 1977) (MacKinnon, J., concurring).

110. As shown by the facts in *Meritor*, a grievance procedure whereby com-

Also, the procedure should afford the complainant the opportunity to remain anonymous in order to encourage the reporting of harassment.¹¹¹ The result of such a policy and grievance procedure could be the employer's insulation from Title VII liability. If the victim chooses to invoke the grievance procedure the employer could attempt to resolve the situation with appropriate action, thereby avoiding litigation. If the victim fails to invoke the grievance procedure a court would apparently be justified in denying relief against the employer.

The Supreme Court's recognition of the "hostile environment" sexual harassment theory represents a step forward in sex discrimination litigation. It is now possible for a victim of sexual harassment to bring a claim under Title VII without having to prove the loss of a tangible economic benefit as a result of the harassment. Both employees and employers should benefit from this ruling by gaining protection from an intimidating work environment and an unreasonable interference with work performance.

The Supreme Court's conclusion that courts should look to traditional agency principles in deciding whether to hold an employer liable for the acts of its supervisors may, however, prove to be a step backwards for the prohibition of sex discrimination in the workplace. Because of the conflicting interpretations of agency law as to what is the proper scope of authority of a supervisor, such a holding may result in some "hostile environment" complainants being left with a cause of action without a sufficient remedy.

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plaints are directed to an immediate supervisor will defeat the purpose of the procedure if the supervisor is the person responsible for creating the "hostile environment." *Meritor*, 106 S. Ct. at 2409.

111. See *Barnes v. Costle*, 561 F.2d 983, 1000-01 (D.C. Cir. 1977) (MacKinnon, J., concurring). Anonymity may encourage those victims of harassment who would normally not report incidents to come forward and report those incidents. See *supra* notes 104-05 and accompanying text.